

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

4 Adv. Case No. 15-01426-scc

5 - - - - - x

6 In the Matter of:

7 LEHMAN BROTHERS HOLDINGS INC.,

8 Debtor.

9 - - - - - x

10 LEHMAN BROTHERS HOLDINGS INC.,

11 Plaintiff,

12 v.

13 iFREEDOM DIRECT CORPORATION (f/k/a NEW FREEDOM MORTGAGE,

14 Defendants.

15 - - - - - x

16

17 U.S. Bankruptcy Court

18 One Bowling Green

19 New York, NY 10004

20 May 5, 2016

21 2:03 PM

22

23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc #52076 Motion to Enforce the Automatic
2 Stay, the Plan, and the Confirmation order against iFreedom
3 Direct Corporation and Security National Mortgage
4 Corporation filed by William A Maher on behalf of Lehman
5 Brothers Holdings Inc.

6
7 Hearing re: Adversary proceeding: 15-01426-scc Lehman
8 Brothers Holdings Inc. v. iFreedom Direct Corporation (f/k/a
9 New Freedom Mortgage Pre-trial Conference

10

11 Hearing re: Adversary proceeding: 15-01426-scc Lehman
12 Brothers Holdings Inc. v. iFreedom Direct Corporation (f/k/a
13 New Freedom Mortgage Doc #I3 Motion of iFreedom Direct
14 Corporation to Dismiss the Complaint, or in the Alternative,
15 to Stay or Transfer This Action, or for the Court to Abstain

16

17

18

19

20

21

22

23

24

25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 WOLLMUTH MAHER & DEUTSCH LLP

4 Attorney for Lehman Brothers Special Financing Inc

5 500 Fifth Avenue

6 New York, NY 10110

7

8 BY: PAUL R. DEFILIPPO

9 WILLIAM F. DAHILL

10 ADAM M. BIALEK

11

12 FENSTERSTOCK & PARTNERS LLP

13 Attorney for Security National

14 100 Broadway

15 New York, NY 10005

16

17 BY: BLAIR C. FENSTERSTOCK

18

19 MACKEY PRICE MECHAM

20 Attorney for Security National

21 350 American Plaza II

22 57 West 200 South

23 Salt Lake City, UT 84101

24

25 BY: GIFFORD W. PRICE

1 MILLER TOONE

2 Attorney for Security National

3 165 Regent Street

4 Salt Lake City, UT 95202

5

6 BY: BLAKE D. MILLER

7

8 COHNE KINGHORN

9 Attorney for iFreedom

10 111 East Broadway, 11th Floor

11 Salt Lake City, UT 84111

12

13 BY: GEORG HOFMANN

14

15 K&L GATES

16 Attorney for iFreedom

17 599 Lexington Avenue

18 New York, NY 10022

19

20 BY: LANI A. ADLER

21

22

23

24

25

1 OKIN HOLLANDER LLC

2 Attorney for The Lindy Funding Trust, Intervenor

3 500 Frank W. Burr Blvd., Suite 40

4 Glenpointe Centre West, 2nd Floor

5 Teaneck, NJ 07666

6
7 BY: PAUL S. HOLLANDER

8
9 STADTMAUER & ASSOCIATES

10 Attorney for Creditor

11 370 Lexington Avenue, Suite 1703

12 New York, NY 10017

13
14 BY: MARC A. STADTMAUER

P R O C E E D I N G S

THE COURT: So we have on the calendar this afternoon two separate matters. One is the motion of Lehman Brothers to enforce the automatic stay, the plan, and the confirmation order against both iFreedom Direct Corporation and Security National Mortgage Company. On that, I have the motion, I have an objection, and a memorandum from Security National and iFreedom and I have Lehman's reply.

Separately, I have iFreedom's motion to dismiss the Complaint pending here or, in the alternative, to stay or transfer the proceedings or to abstain. So did you have an idea as to how we should proceed?

MR. MAHER: Your Honor, Bill Maher on behalf of the plan administrator, LBHI. I thought we would start with the motions to enforce the automatic stay.

THE COURT: Yes, I agree.

MR. MAHER: And then address the other issue, which is somewhat related.

THE COURT: Right, right. That sounds good. So why don't you tell me who you folks are and who's going to be speaking.

MR. FENSTERSTOCK: Your Honor, on behalf of Security National, which is this table, Blair Fensterstock from Fensterstock & Partner, Gifford Price from Mackey Price, Blake Miller from Miller Toone, and Blake will be

1 handling most of the argument, and then we have our General
2 Counsel, Jeff Stevens.

3 THE COURT: Okay. Let me get that again, you are
4 all Security National.

5 MR. FENSTERSTOCK: Yes.

6 THE COURT: Okay. And what about iFreedom folks.

7 MR. HOFFMAN: Good afternoon, George Hoffman. I
8 represent iFreedom. Also here is Lani Adler.

9 THE COURT: All right, thank you. I've read the
10 papers obviously.

11 MR. MAHER: Good afternoon, Your Honor. I'd like
12 to set the stage, if I could, just a little in terms of
13 what's at issue on these motions.

14 THE COURT: Sure. Also, I think it'll be helpful
15 just to make sure everybody has the same predicate facts.
16 I've probably lost count at this point, but this is at least
17 the third or fourth round, if you will, of engaging with
18 counterparties against whom Lehman is asserting
19 indemnification claims arising from or in connection with
20 the Fannie and Freddie settlements. There are, of course,
21 differences from one to the next, but in material respects,
22 that's what we're talking about -- that class of
23 counterparties.

24 MR. MAHER: Yes, Your Honor.

25 THE COURT: Okay.

1 MR. MAHER: With respect to the parties who are
2 here before you today, Security National sold us 136
3 defective loans in an amount totaling approximately \$24
4 million; iFreedom sold us six defective loans. And, again,
5 I'm focusing here on the loans that were settled as part of
6 the Fannie Mae/Freddie Mac global settlement in January and
7 February, 2014.

8 THE COURT: Right.

9 MR. MAHER: iFreedom sold us six loans: two ones
10 that deal with the correspondent lender agreement, the LPA,
11 the loan purchase agreement, and the incorporated seller's
12 guide; and four dealing with broker agreements, which is
13 separate, but similar, in the sense that there's a broad
14 indemnification clause kick in with that based upon breaches
15 of representations and warranties.

16 THE COURT: Okay.

17 MR. MAHER: Security Nationals are all loans under
18 the LPA and the seller's guide, as you've been addressed
19 before previously, Your Honor.

20 THE COURT: So give me again the amount of the
21 Security National. You said it was --

22 MR. MAHER: I'm sorry, I didn't get to that, Your
23 Honor. It was approximately a little more than \$1 million.

24 THE COURT: That's iFreedom.

25 MR. MAHER: iFreedom.

1 THE COURT: And Security National was?

2 MR. MAHER: About \$24 million.

3 THE COURT: Okay.

4 MR. MAHER: Your Honor, that's an important point.
5 iFreedom has six loans at issue for about a million dollars.
6 They filed five separate lawsuits in Utah, opposed a motion
7 to consolidate that we filed in Utah. They filed a motion
8 to withdraw the reference from this Court. They filed a
9 motion to dismiss on jurisdictional and on procedural
10 grounds, and they're opposing our motion for enforcement of
11 violation stay.

12 Any lawyer would know that it is economically
13 irrational to spend hundreds of thousands of dollars.

14 THE COURT: So what do you think -- so what's --
15 so assuming those facts to be true, which I can hear your
16 adversary tell me whether or not it's true, what's your
17 point? What do you think is going on?

18 MR. MAHER: I think they're just sparing no cost
19 on litigation to try to avoid being in this Court, where
20 this Court has already ruled and has been upheld by Judge
21 Pauley, that the claims are not time barred. That is their
22 principal defense. There are other defenses that they've
23 asserted, as we'll get into, but they're spending untold
24 amounts of money on procedural motions to avoid being in
25 this Court. Anyway, I'll get to that when I get to the

1 argument, Your Honor.

2 As you'll recall, there are representations and
3 warranties in the loan purchase agreement, and particularly
4 in the seller's guide that's incorporated into the loan
5 purchase agreement. Section 711 of the seller's guide has a
6 very broad indemnification clause that Your Honor is
7 familiar with.

8 There were already disputes with Security National
9 -- again, that's the \$24 million in loans, Your Honor -- in
10 2007. And that's actually alleged in their Complaint in
11 Delaware in Paragraph 17. There were disputes over prior
12 loans. And, again, if you remember when I was here before,
13 Your Honor, I explained to you that most of what we're doing
14 here relates to the Fannie and Freddie settlements in 2014 -
15 - January and February of 2014, which were approved by this
16 Court.

17 However, prior to that time, even prior to the
18 bankruptcy filings, there were loans that were purchased in
19 the ones and twos and threes and they were then sold to
20 Fannie Mae and Freddie Mac, they'd find defects, they'd say
21 take them back. We then turn around to the counterparties
22 and there would be various lawsuits in different parts of
23 the country or disputes about whether or not the loan was
24 defective and whether or not they were.

25 THE COURT: Right, but at that moment in time -- I

1 went through this in Hometrust, the two companion cases that
2 I call Home Trust. At that moment in time, the only party
3 that had the right to do anything was Fannie and Freddie.

4 MR. MAHER: Correct.

5 THE COURT: They were the only -- at that moment,
6 they were the only party who could make a repurchase demand
7 and seek to pursue remedies under 710 or otherwise.

8 MR. MAHER: You're right, Your Honor. You've been
9 right all along. They were trying to confuse the record --
10 they're trying to confuse the record in terms of what was
11 said in Hometrust LHM and how things happened. Where the
12 loans were sources by Lehman Brothers Bank from Security
13 National or somewhere else, they were transferred and signed
14 by LBHI. LBHI then sold the loans to Fannie Mae or Freddie
15 Mac, gave their own separate co-extensive representations
16 and warranties that were co-extensive with the ones, of
17 course, they relate to the value of the property, the
18 borrowers, a lot of things that you would have to be for --
19 but they were co-extensive. They were not assigned the
20 rights under the LPA or the seller's guide.

21 So you were right, Your Honor. During the time
22 when Fannie and Freddie had those loans, they were the party
23 in possession of the loans that had the right to assert
24 violations, whether it was against us or, arguably,
25 depending upon whether the third-party beneficiaries,

1 against Security National or somebody else.

2 It was only in 2014 -- January and February of
3 2014 -- when the contingent obligation that they had under
4 these prepetition contracts actually became crystallized in
5 an indemnification claim. Under New York law, we were able
6 to turn around under these prepetition contracts and sue
7 them.

8 So you were right, once they left our hands, we
9 had no ability to sue them on those loans because they were
10 in Fannie Mae or Freddie Mac's hands. You've been right all
11 along. They're trying to confuse the record and say
12 somehow, we had these rights, we transferred them to Fannie
13 and Freddie, which we didn't. We sold the loan; we didn't
14 transfer or assign the rights. And then somehow we got
15 those things back from Fannie and Freddie in 2014, and we're
16 now sitting on those.

17 THE COURT: But for today's purposes, frankly, all
18 this is beside the point.

19 MR. MAHER: Yes, absolutely, Your Honor.

20 THE COURT: All beside the point.

21 MR. MAHER: I agree with you, but they brought it
22 up in their papers and I'm trying to clarify the confusion
23 that they've created -- attempted to create.

24 THE COURT: Well, I have a memory. But it's all
25 beside the point for the purposes of today, although it

1 does, I think, animate the reality of, I think as you
2 described it, of what's happening here. There is this 10th
3 Circuit case that came down; there's already been someone
4 who's come in -- I'm not going to be able to recall the name
5 of the parties -- that was with the Hometrust, it was about
6 a month ago, who came in and said --

7 MR. MAHER: Standard Pacific.

8 THE COURT: Standard Pacific, thank you. Standard
9 Pacific, 10th Circuit case, they're right, you're wrong, you
10 know, and nothing's changed.

11 MR. MAHER: Exactly.

12 THE COURT: And if you read, again, beside the
13 point, but if you read Hometrust, you know, I left no stone
14 unturned. I went through every single case that's pending
15 out there and parsed the provision. So be that as it may,
16 it's not for today. What's for today is whether or not they
17 are permitted to have commenced these actions in Utah and
18 Delaware, and whether that's in violation of the automatic
19 stay, the plan, the confirmation order.

20 MR. MAHER: Very well, Your Honor. Now, when
21 Lehman filed bankruptcy in September of 2008, clearly, these
22 contingent indemnification rights that we had under the LPA
23 and the seller's guide were property of the estate. There's
24 no doubt that under a broad definition of the Bankruptcy
25 Code of what is property of the estate, contingent,

1 unmatured rights are part of what is the property of the
2 estate.

3 Fannie and Freddie filed proofs of claim in the
4 Bankruptcy Court about loans that had been sourced from LBHI
5 to Fannie and Freddie. That was settled in January and
6 February of 2014 and was approved by this Court.

7 Now, that crystallized our right to sue, Your
8 Honor, which is relevant to the issue today. However, we
9 made an application to Your Honor that it wasn't efficient,
10 it wasn't productive, it wasn't the best use of the Debtor's
11 resources to litigate against everyone immediately
12 simultaneously. We, therefore, applied for an ADR order
13 from you where we would be allowed to mediate and try to
14 resolve these claims during the ADR process. You approved
15 that order in June of 2014.

16 If you remember at the hearing, Your Honor, some
17 of the people would say, well, how do I know that the claims
18 -- what claims are asserted against me, what loans, what
19 claims. People came and objected to that and said, I need
20 clarification. And we said to you, Your Honor, we are going
21 to specify very clearly in the ADR package that we're going
22 to give people which loans, what amounts, what's defective
23 about those loans, and what we're seeking, and our legal
24 theories. In other words, we're going to give them the
25 whole litigation conundra, so that they'd know exactly what

1 the claims are. And if we don't resolve the claims in
2 mediation, we're going to sue you. That was what was last.

3 So we go through this ADR process. In order to
4 try to do it more efficiently, more cheaply, to save money
5 for the estate, we didn't immediately go into the ADR
6 process. We had authority, we engaged in a B2B process, a
7 business-to-business person, which we tried to resolve the
8 issues.

9 If you'll recall, Your Honor, what happened then
10 is people would say the statute of limitations bars these
11 claims. I don't have to pay you anything. There's nothing
12 to talk about.

13 THE COURT: Well, it was also worse than that. It
14 was the statute of limitation bars these claims, and it was
15 being said out there -- and I learned this in filed papers -
16 - that sellers or counterparties were being advised, you
17 don't even have to talk to Lehman because your claims are
18 barred by the statute of limitations. So we had
19 counterparties who were simply not complying with the ADR
20 order because they had been advised that they didn't have
21 to. So we had to clarify that, that that was not permitted.

22 MR. MAHER: Right. And so when we got to that
23 roadblock, Your Honor, what we did is we filed two
24 litigations here in this Court as test cases -- the
25 Hometrust and the LHM case -- for it to tee up the issue

1 before Your Honor of the applicability of the statute of
2 limitations and whether, in fact, these claims were timely
3 or time barred.

4 There was litigation in this Court. It was
5 clearly intended by Lehman and shown to the world that we
6 were willing to litigate these claims in this Court to the
7 extent that they were not going to be able to be resolved.
8 Your Honor ruled upon that in February of 2015. You issued
9 the order about a year ago -- it's almost a year ago today -
10 - May 7th of 2015. In the meantime, LHM and Hometrust, if
11 you remember, moved to withdraw the reference from you,
12 saying you didn't have jurisdiction over these claims.

13 THE COURT: Right.

14 MR. MAHER: That was denied by Judge Engelmayer
15 and Judge Wood, two separate -- one for Hometrust, one for
16 LHM. If you remember, Judge Engelmayer ruled just before --

17 THE COURT: I think every single judge in the
18 Southern District of New York has gotten a motion to
19 withdraw the reference from it.

20 MR. MAHER: Yes, Your Honor. But I'm saying with
21 respect to these particular claims, they said you don't have
22 jurisdiction.

23 THE COURT: Right. They came back, but then it
24 went up to Judge Pauley.

25 MR. MAHER: Yes. But what they said on the motion

1 to withdraw the reference, Judge, is if you remember Judge
2 Engelmayer wrote a nine-page opinion.

3 THE COURT: I don't.

4 MR. MAHER: He wrote a very flattering nine-page
5 opinion saying that you were in the best position to manage,
6 organize, and control this flood of potential litigation
7 that was going to happen in the Courthouse. It said many
8 other nice things, but that was the focus of what he was
9 saying.

10 THE COURT: I'll tell you, I mean, once something
11 leaves, I've got enough to do. I probably didn't even read
12 it. I mean, I may not even know about it.

13 MR. MAHER: The point is, the District Court
14 looked at this and said you were the person, this was the
15 Court that these claims should be handled and managed in in
16 negotiation and potential litigation. Judge Wood separately
17 wrote a three-page opinion saying he agreed with Judge
18 Engelmayer.

19 Then we had, by the way, iFreedom, as I mentioned,
20 has made a third motion to withdraw the reference on these
21 very same claims in the Southern District. It's now before
22 Judge Caproni. Judge Caproni has not resolved the issue,
23 has not contacted the parties instantly briefed.

24 You ruled that the claims weren't time barred on
25 May 7th of last year, Your Honor. That was, as you

1 mentioned, appealed -- or permission to appeal.

2 THE COURT: For permission to appeal.

3 MR. MAHER: Judge Pauley wrote a lengthy decision
4 in which he was, again, very flattering of the work that you
5 had done with respect to reading all of these cases, and
6 basically said there is no basis to doubt that Judge Chapman
7 was right in her ruling that these claims are timely and
8 that they're appropriately brought. That's the end of the
9 ruling in terms of this Court and the District Court, Your
10 Honor, as of September 25 of last year.

11 All right, so what happened with respect to these
12 counterparties. What we had is in April 28th, after you had
13 ruled that the statute of limitations wasn't a bar, we
14 started engaging the ADR process in earnest. We sent an ADR
15 package to iFreedom, we sent an ADR package to Security
16 National on August 27th.

17 Again, Judge, those packages are very specific.
18 They say these are the five loans, the six loans. There's
19 no randomness about why there are six loans in this
20 declaratory judgment actions. We told them which loans they
21 were. We told them what was the defect with the loans. We
22 told them what our legal theories were of why you were
23 liable for that, not just on statute of limitations, but on
24 a whole host of other issues. If you do not think that that
25 is a roadmap to we are going to sue you, here is the

1 litigation coming if you don't resolve it. There's no case
2 out there that says you have to be more precise than that.

3 Anyway, we had a mediation with iFreedom in
4 September of 2015. We had a mediation with Security
5 National of January 7th of this year.

6 THE COURT: But why does what you said matter?
7 Why can't they say, so what, right? So what, we've engaged
8 in the ADR process, and if they want to sue first.

9 MR. MAHER: Right. That gets to the meat of why
10 we're here today, Your Honor.

11 THE COURT: Yeah.

12 MR. MAHER: I raise this as background because,
13 frankly, iFreedom's motion to dismiss, they raise a lot of
14 these issues about who filed first.

15 THE COURT: Yes, that's true.

16 MR. MAHER: Whether you were told in advance of
17 what the claim -- litigation insipient or not, all of this
18 is relative to those issues, Your Honor.

19 THE COURT: I understand.

20 MR. MAHER: So iFreedom sued in December five
21 separate declaratory judgment actions on six loans. Within
22 days -- literally within days -- we filed our own action
23 here against iFreedom. That's important when we get to the
24 other motion, Your Honor.

25 Security National, they filed a lawsuit in

1 Delaware on January 26th, and we filed again our omnibus
2 action, including then roughly 150 counterparties, within
3 days of that filing. Again, that matters in terms of who's
4 first and whether or not there's any first to file rule
5 principle that applies when people are filing within days of
6 each other.

7 Their filings, Your Honor, were clearly efforts to
8 anticipate that we were going to sue them and get the first
9 drop on us in the jurisdiction that they thought was
10 favorable to them, away from your ruling and Judge Pauley's
11 ruling on the statute of limitations. They're forum
12 shopping, in our view, and it's an end run, frankly, around
13 this Court's jurisdiction.

14 We're coming now to what is really the legal issue
15 for you today in terms of the automatic stay. We've made
16 applications under two separate provisions to enforce the
17 automatic stay: 362(a)(1) and 362(a)(3).

18 Turning first to 362(a)(1), Your Honor, it
19 requires the commencement of a proceeding against a Debtor
20 that was or could have been commenced before the
21 commencement of the case under this title. Now the mortgage
22 sellers can see the declaratory judgment action would, in
23 fact, violate -- could violate -- that provision of the
24 automatic stay. That's iFreedom's brief at Page 13.

25 THE COURT: Well, but see, this is where it gets

1 really interesting because of the inconsistencies in the
2 thinking by what the cause of action accrue, because in
3 their view of the world, the reason that the claims were
4 barred by the statute of limitations is that the cause of
5 action accrued way earlier. Right?

6 MR. MAHER: Yes.

7 THE COURT: But that's not right. The cause of
8 action didn't accrue then. The cause of action that you're
9 asserting against them for indemnification did not accrue
10 until the Fannie and Freddie settlement was effective.

11 MR. MAHER: Correct. But under their theory, Your
12 Honor, they could have sued prepetition for a declaration
13 that these claims were untimely or that there were no
14 breaches of representations and warranties or the assignment
15 wasn't proper or all the other things that they were --

16 THE COURT: But they couldn't have sued -- they
17 could have sued the party in whose hands the piece of paper
18 was at that time, not -- and that wouldn't have been the
19 reorganized LBHI. Somebody has a little timeline in there.

20 MR. MAHER: Yeah, I saw the timeline, Your Honor.
21 It's inaccurate. It is accurate with respect to repurchase
22 claims.

23 THE COURT: Yes, that's the point. It's accurate
24 with respect to repurchase claims. It's the repurchase
25 claims that could have been brought prepetition. The claim

1 that you are asserting against them now is not a repurchase
2 claim.

3 MR. MAHER: I understand that.

4 THE COURT: It's an indemnification claims.

5 MR. MAHER: I understand that.

6 THE COURT: So, therefore, because it's not a
7 repurchase claim, your first -- the 362(a)(1) argument, I
8 don't think works.

9 MR. MAHER: Let me respond to that. I understand
10 your point exactly, Your Honor. It depends upon the yin and
11 the yang, which glass or prism you view it through --

12 THE COURT: You are really rolling out the
13 metaphors there -- yins and yangs and glasses and prisms.

14 MR. MAHER: -- under their theory, Your Honor.
15 Our point is I agree with you. We think that the claims did
16 not accrue until January or February of 2014. And, of
17 course, it's, like, well, how could they have brought those
18 claims prepetition if they didn't accrue until January 20 of
19 2014, on our view of the world.

20 On their view of the world, the claims started to
21 accrue on the indemnification claims when they sold the
22 loan. That's their view of the world. That is what they
23 are propagating in all these courthouses around the country.
24 Your indemnification claim accrues at the same time you sold
25 the loan.

1 THE COURT: Well, I have this colloquy in
2 Hometrust. And counsel, at that hearing, acknowledged that,
3 had you shows up at that point and attempted to sue, it
4 would have been dismissed for not being ripe. So it sets up
5 this conundrum of you're either too early or you're too
6 late.

7 MR. MAHER: Correct.

8 THE COURT: Which can't be the way that it works.

9 MR. MAHER: I agree with you, Your Honor. And
10 that's the right way the world should work. I agree with
11 you. What I'm saying is, their view of the world -- that
12 the indemnification claim runs from the date of the purchase
13 of the loan -- means that they could have brought these
14 claims prepetition depending upon the timing of the loan, or
15 they could have brought a declaratory judgment saying
16 there's going to, or on their assignment claim or on their
17 breach of the written warranty claim.

18 I'm saying if you look at it from their
19 perspective on their view, they could have brought a claim
20 prepetition that is barred under 362(a)(1). That's my
21 point. I agree with the way the world should work and the
22 way the world you see it, Your Honor.

23 THE COURT: Right. But I have to rule based on
24 the correct view of the world. I don't agree with that view
25 of the world, right?

1 MR. MAHER: Yes. No, but, Your Honor, what
2 they're saying is these claims could not have been brought
3 prepetition. Under their view of the world, they could have
4 been.

5 THE COURT: Right, I got it.

6 MR. MAHER: Anyway, I'll move on. They cite Excel
7 Specialty, Your Honor. That has nothing to do with this
8 situation. But if we're moving on past 362(a)(1), I'll pass
9 that case.

10 THE COURT: Yeah, because I think that the real
11 crux of it is set forth starting at Page 8 of your reply,
12 where you walk through how 362(a)(3) and the plan and the
13 confirmation order, how that all works together.

14 MR. MAHER: Right. Your Honor, under 362(a)(3),
15 any act to obtain possession of property of the estate or
16 property from the estate or to exercise control over
17 property of the estate is subject to the automatic stay.

18 Now I've already established and we discussed
19 earlier, Your Honor, that there's no question that as of the
20 petition date, these contingent indemnification claims were
21 property of the estate, contrary to their factual confusion.
22 There's no question that the definition of property of the
23 estate is extremely broad. These contingent unmaturred
24 indemnification claims weren't property of the estate as of
25 the date of the filing.

1 THE COURT: But they say to that, they say, ah-ha,
2 then they quote me. They quote me for the proposition that
3 the claims didn't accrue until the Fannie and Freddie
4 settlement; so, therefore, how could they have been property
5 of the estate at the time of the confirmation.

6 MR. MAHER: Right. And the answer is that they
7 were contingent unmatured indemnification claims, which
8 clearly fall within the broad definition of property of the
9 estate as of the petition date.

10 Now what they also say separately -- and I think
11 that responds to that argument. What they also say
12 separately is even if it was property of the estate, it
13 ceased to become property of the estate after the plan was
14 confirmed and became effective. That's one of their
15 arguments, Your Honor. I'll get to that in a second.

16 The contingent indemnification claims are
17 prepetition contracts that were property of the estate. The
18 Lehman plan provided for liquidation of the indemnification
19 claims for the benefit of the creditors of the estate. And
20 as part of the plan, Your Honor, there was a broad
21 injunction provision, which continued the automatic stay.
22 Under 1307 of the plan at 54 of the order, all injunctions
23 or stays arising out under or entered during the Chapter 11
24 cases, under Section 105 or 362 of the Bankruptcy Code or
25 otherwise, and in existence on the confirmation date shall

1 remain in full force and effect until the closing of all
2 these cases.

3 That, Your Honor, and you also retained
4 jurisdiction under the plan in order to enforce those
5 things. The reason we are all here, Your Honor, the reason
6 that you approved these indemnification settlements, and the
7 reason you approved the ADR order is there is jurisdiction
8 under the plan to protect what was the property of the
9 estate.

10 Now it has revested. They are correct, it
11 revested, but it revested subject to the other provisions of
12 the plan. The other provisions of the plan maintain the
13 prior injunctions that were in place, Your Honor, as of the
14 time that this was property of the estate. And there's a
15 reason for that -- LBHI did not get a discharge under the
16 plan, Your Honor, and the continued stay is the only thing
17 that prevents the dismembering, frankly, of the assets of
18 the Debtors from people filing all over the country with
19 respect to claims that Lehman has.

20 THE COURT: I'm struggling to find it now.
21 There's a provision in the ADR order -- what I'm looking for
22 is in one of the pleadings, there's a quote from the ADR
23 order. I'm sorry, I had a long day ahead. Here it is, it's
24 on Page 14 of Security National's memorandum, and it quotes
25 Paragraph 25 of the ADR order. And it says, if a seller --

1 that would be them -- has commenced any action or proceeding
2 in any other Court or forum or commences any other action or
3 proceeding in any other Court or forum following service
4 upon it of an indemnification ADR package, LBHI reserves the
5 right to remove to this Court any such lawsuit, proceeding,
6 or claim, and the defendant take action in any such Court or
7 other pleading to protect LBHI's creditors.

8 Security National, in its pleadings says, it
9 responded that it did not agree that LBHI would have any
10 valid removal rights, and it preserved all of its defenses
11 related to removal.

12 So my question is, if you weren't contemplating
13 that, in fact, there could be litigation elsewhere that
14 wasn't violative of the plan and the confirmation order, why
15 is that in the ADR order?

16 MR. MAHER: I think we responded to that in our
17 reply brief, Your Honor. We basically said it's just a belt
18 and suspenders thing.

19 THE COURT: In case someone did it?

20 MR. MAHER: In case somebody did it. That didn't
21 say we didn't think it wouldn't be in violation of the
22 automatic stay; it just says we also have this right, we're
23 reserving that right as well. We always have the right,
24 which is specifically reserved in the plan and the
25 confirmation order, that the stays that were in place remain

1 in place under the plan and the order. It's completely
2 coextensive. The plan already says that. This is saying
3 something in addition to that, Your Honor. It's a belt and
4 suspenders. That's what we said in our reply papers.

5 Again, just a couple of references to the cases
6 that they cite, Your Honor, on the 362(a)(3). Obviously, we
7 believe the Utah action and the Delaware action are intended
8 to undermine LBHI's ability to litigate the indemnification
9 claims in this Court, which is overseeing this entire
10 process as the District Court has said is the appropriate
11 way for these matters to be handled.

12 They have cited -- we cited the Madoff decision
13 from 2011, Judge Lifland in which the defendant was held to
14 have violated the automatic stay under 362(a)(3) by filing a
15 dec action in the Cayman Islands -- it was Maxum in that
16 case -- saying that none of their rights declared under
17 these agreements upon which the Debtor wanted to pursue as
18 the natural claim if it's claims. And Judge Lifland clearly
19 held in that case that that was a violation of 362(a)(3).
20 We cite that to you as precedent for what we're saying here
21 today.

22 Now they cite you two or three cases, Your Honor.
23 There's the ResCap case from 2015 by Judge Glenn. That has
24 nothing to do with the circumstances here. They use the
25 colorful sword and shield language. But if you actually

1 read that case, what that case relates to is a post-
2 confirmation dispute in which the Debtor decided to pursue
3 litigation, instead of making the put back, that they were
4 required to. And as a result of that, the other side was
5 entitled to attorneys' fees, and there was a counterclaim in
6 that case. That has nothing to do with this circumstances.
7 That is totally -- basically, what Judge Glenn said is that-
8 -

9 THE COURT: Sause for the goose.

10 MR. MAHER: Yes, exactly. Once you walked out of
11 here, if you are breaching your contract and there's a
12 provision saying that they can recover, they can recover.
13 That has nothing to do with the situation that we have here.
14 They cite the (indiscernible) case. That case involved a
15 group of minority shareholders who sued a company that the
16 Debtor wanted to do business with, but had yet not done
17 business with, in which they needed Bankruptcy Court
18 approval in order to approve that relationship. So it was
19 completely in (indiscernible), and they were saying it was a
20 violation of 362(a)(3). And the Court was saying, you don't
21 even have a contract, you don't have an agreement, and it's
22 minority shareholders of the other company that the company
23 you want to do business with are suing for breach of
24 fiduciary duty. That's not a 363(a)(3) problem. That's the
25 case they cite to you; there's no relevance to this case,

1 Your Honor, and similar with the other case they cite.

2 Now I can briefly, if you'd like, address --
3 literally in two minutes -- the opposition to the motion to
4 dismiss, stay, or transfer to iFreedom, or I can wait until
5 after this.

6 THE COURT: Why don't we wait. Can you give me
7 the page cite to the Judge Lifland decision? I mean, in the
8 brief, which brief it's in.

9 MR. MAHER: In my brief?

10 THE COURT: Yes. It's in your reply?

11 MR. MAHER: Well, it's actually in our main brief
12 and in our reply, Your Honor. It is called Securities
13 Investor Protection Corp., the one off Madoff.

14 THE COURT: Just looking for the page.

15 MR. MAHER: It's 460.

16 THE COURT: Oh, there it is, I see.

17 MR. MAHER: 460 Bankrupt 106 (2011).

18 THE COURT: Right, thank you. Thank you very
19 much.

20 BLAKE MILLER: Good afternoon.

21 THE COURT: Good afternoon.

22 BLAKE MILLER: I'm Blake Miller representing
23 Security National. Your Honor, the issue here today simply
24 whether the Delaware Superior Court (indiscernible)
25 automatic stay, at least as to Security National. That's

1 our case.

2 There are two provisions of the automatic stay
3 that are sought to be invoked. You got (a)(1) and (a)(3),
4 actions that could have been commenced by the petition date
5 or actions to take control of the property of the estate.
6 Let me address the first.

7 The issue there is simple. Could Security
8 National have commenced a declaratory judgment action by at
9 least September, 2008. The law on what's required for
10 declaratory judgment actions are pretty clear across the
11 country, and Delaware follows it, black-letter law, four
12 requirements: first, there has to be a present dispute
13 relating interest; second, must be asserted against a party
14 who holds that interest; third, the conflicting interest
15 must be real and they must be adverse; and four, they must
16 be right and not contingent on any future possibilities.

17 So present disputes can be contingent, can be
18 unmaturred, can't be potential. Lehman doesn't dispute these
19 requirements; in fact, it'd be hard to legitimately do so.
20 And although we set forth the applicable law for declaratory
21 judgment actions, Lehman hasn't cited a single case in
22 contrary. They do take action -- issue with our citing
23 Excel Specialty case, on the base that Excel Specialty,
24 Lehman claims, does not hold that declaratory judgment
25 actions are not immune from the automatic stay. Well, I

1 agree. It didn't hold that.

2 THE COURT: You know, we can short circuit this
3 because there's no way that this action could have been
4 brought prepetition because a claim did not arise until
5 2014.

6 BLAKE MILLER: Agreed. Basically, we didn't know.
7 To supplement that, Your Honor, and cut to the chase, we
8 sold loans to the bank. After that, we don't know what
9 happened to them.

10 THE COURT: Well, now you do.

11 BLAKE MILLER: Now we do, but in 2008, we didn't.
12 And a number of these got sold all through secondary
13 investors all over the place. We know now about 1 percent
14 ended up in Fannie and Freddie Mac of our loans. I don't
15 know, I can't sit here and tell you -- stand here, sorry --
16 and tell you what happened to the other 99 percent. I
17 couldn't sue them to date, I wouldn't know who to sue. I
18 guess I had to do John Doe declaratory judgment actions all
19 across the country.

20 So if I were to bring a declaratory judgment
21 action in 2008, I'd have to file an action against someone I
22 don't know against a claim that hasn't arisen, not yet
23 asserted, and upon which I (indiscernible).

24 THE COURT: You won this point.

25 BLAKE MILLER: Should I go on?

1 THE COURT: So it's a local rule -- when you win,
2 you can stop arguing the point.

3 BLAKE MILLER: Sorry, I get excited. Second part,
4 (a)(3), property of the estate.

5 The obvious question then, is as of the filing of
6 the Delaware action, is it property of the estate. I'm not
7 going to argue whether or not it was in September, 2008. I
8 mean, I think it's an interesting position that under their
9 theory, you could argue it either way, but it doesn't matter
10 for us. As of 2016 when the Delaware action was filed, was
11 that property of the estate.

12 1141 of the Bankruptcy Code is clear: Upon
13 confirmation of the plan, unless the plan or confirmation
14 order otherwise specifies, the property of the estate ceases
15 and becomes vested back in the Debtor.

16 So we look at the plan -- that's what the law is
17 and generalized. Let's look at whether the plan or the
18 confirmation order otherwise specifies, and 13.7 of the plan
19 is the application provision. It provides that on the
20 effective date, property of the estate shall vest in the
21 respective Debtor in all respects as if there were no
22 pending bankruptcy cases under any chapter or provision of
23 the Bankruptcy Code -- pretty clear. The confirmation order
24 in Paragraph 39 is essentially the identical language. It
25 vests in the Debtor as if no bankruptcy case or provision

1 applied. It's the (indiscernible) very broad, revesting
2 provisions seen in cases all across the country.

3 Now Lehman points out, though, there's language at
4 the end of that -- each of those paragraphs that say -- that
5 follows as if there are no pending cases language, which
6 says, and I quote, "except as explicitly provided herein."

7 THE COURT: Right.

8 BLAKE MILLER: Explicitly means fully and clearly
9 expressed, meaning leaving nothing implied. So the issue
10 is, is there anything in the plan that expressly explicitly
11 -- not impliedly -- continues property of the estate. Now
12 we're conflating on this side continuation of the automatic
13 stay, which another provision plan does, with continuation
14 of the estate. What we're looking in 13.7 is does the
15 estate continue irrespective of 13.7. Is there explicit
16 provision of the plan continuing the estate? Not the stay,
17 the estate, and there is none -- 13.7 couldn't be clearer,
18 in fact, and the same with the confirmation order.

19 What Lehman argues in the reply memo is though
20 even though these claims vested back to the Debtor from the
21 estate on the effected date, they quote, "retain the
22 characteristics of and continue to functionally be property
23 of the estate. It's an implied -- attempt to imply the
24 continuation of the estate, something this plan says you
25 can't do -- invest, unless expressly explicitly provides a

1 continuation.

2 So any attempt to imply the continuation of the
3 estate is contrary to the terms of both the plan and the
4 confirmation order.

5 Another provision of the plan, they cite -- I'm
6 sorry.

7 THE COURT: I'll let you keep going.

8 BLAKE MILLER: Have I confused you?

9 THE COURT: No, you have not confused me. You've
10 not confused me at all. You are -- I disagree with your
11 reading of how all this works. It would lead to reading the
12 confirmation order as being a completely empty and a
13 document that has no protective power of the Debtor.

14 Well, what would be the point of it? The point of
15 the provisions in 13.1 and 13.7 and Paragraph 54 of the
16 confirmation order are to exactly do -- to give the Debtor
17 the exact right that it has here, which is to continue to
18 liquidate and collect and solely control property of the
19 estate. This action, this cause of action against your
20 clients, as of the time that that confirmation order was
21 entered was undeniably property of the estate.

22 BLAKE MILLER: I believe under --

23 THE COURT: Now you're conflating unmatured and
24 contingent with whether or not something was property of the
25 estate.

1 BLAKE MILLER: I'm not trying to. What these
2 claims were, matured and co-present effect, I don't care.
3 The issue is whether or not --

4 THE COURT: You need to care.

5 BLAKE MILLER: I don't care for the purposes of
6 determining if the property estate in 2016. The issue is
7 was there an estate that could hold those claims in 2016, or
8 did they go back to the Debtor free and clear of the
9 Bankruptcy Code and Bankruptcy Rules as if there are no
10 pending case. I think the confirmation order and the plan
11 do very effective things. These are done all the time,
12 where they vest back in the Debtor. And contrary to what
13 counsel says, there is a discharge of the plan. It's in
14 Paragraph 13.4.

15 So the other thing you would have to read 13.7 to
16 do is basically change the operation of 362. What it says -
17 - I'm sorry, not 13.7, that's the vesting provisions. The
18 provision dealing with the continuation of the stays. Any
19 stay in effect, whether under 105 or 362, shall continue.
20 It provides for a dis. It doesn't change the operation of
21 the automatic stay -- only Congress can do that; it provides
22 that simply whatever stays are in existence at the time
23 shall continue until closing of the case. It doesn't make
24 any broader, it doesn't change they operate, it doesn't
25 change 362's working at all. And what we know of 362,

1 there's a number of different actions that can violate the
2 automatic stay, one of which involves property of the estate
3 to stay free.

4 THE COURT: What's the purpose of the extension of
5 the injunction under the plan and the confirmation order?
6 What do you think the purpose of that is?

7 BLAKE MILLER: In cases that I've done, largely
8 because there's often these type of plans where discharge is
9 granted upon distribution. A discharge is usually on the
10 automatic stay for all non-estate property continues until
11 closing the case or discharge.

12 And in this case, they're providing for all those,
13 all the other elements of an automatic stay for non-estate
14 property continues now 'til closing -- not discharge --
15 closing. That's what this did. It affected the timing of
16 non-estate property automatic stay. Look at 362. There are
17 a number of provisions that are applicable, or the actions
18 that violate the automatic stay.

19 THE COURT: But the point of these plan provisions
20 was to continue to protect property of the estate --
21 Debtor's property of the estate as of confirmation in the
22 same way that it was protected prior to confirmation.
23 That's what this does.

24 BLAKE MILLER: Then it changes Section 362. Your
25 Honor, I don't think it can do that generally because 362 in

1 two different ways makes very, very clear. The stay cannot
2 protect property once it leaves the estate; 362(a)(3) says
3 it only protects property of the estate, and 362(c) says the
4 automatic stay terminated as to property of the estate when
5 it ceases to become property of the estate.

6 THE COURT: It says except as explicitly provided
7 herein.

8 BLAKE MILLER: And I don't know anything that's
9 explicitly provided to continue the estate. If you
10 interpret it that way, Your Honor, then what we have -- I
11 mean, 362 now reads differently, but I don't think that was
12 what was intended. It's a plan injunction then. Let's make
13 it a plan injunction.

14 THE COURT: I'm not going to allow you to put
15 words in my mouth. You can make your argument.

16 BLAKE MILLER: All right. The other concept, and
17 it would appear to me, would be it didn't continue the
18 automatic stay. It created a new stay under the plan that,
19 irrespective of the fact the 362 ends the stay when property
20 no longer is property of the estate, this shall continue a
21 stay. And that's a plan stay, a plan injunction, and it
22 binds those who are bound by the plan.

23 Under the Code, 1123 -- 1141, I'm sorry -- it
24 binds the Debtor, equity security holders, those who receive
25 distributions under the plan, creditors. It's not disputed

1 we're none of those. The confirmation order says the same
2 thing; it binds the creditors, the Debtor, equity security
3 holders, those receiving distributions under the plan. The
4 plan also says the same thing. We have shown where we are
5 none of those. We're just a party that, years later, Lehman
6 has asserted a claim against. We did not participate in the
7 case, their case. We did not offer a proof of claim. We're
8 not a creditor. We're not a security holder. We're
9 nothing.

10 So if it is an injunction that is not found within
11 362, but derives its power and effectiveness from the
12 confirmation order, it doesn't bind us.

13 THE COURT: But the cause of action is property of
14 the Lehman estate, right?

15 BLAKE MILLER: I would disagree, respectfully.

16 THE COURT: So whose property is it?

17 BLAKE MILLER: The Debtors. When a bankruptcy
18 case is filed, the Debtor has a universe of properties.

19 THE COURT: Okay. You know, maybe I've had too
20 many long days, but I really feel like you're lecturing me.

21 BLAKE MILLER: I don't mean to.

22 THE COURT: And I actually know how to do this,
23 okay. So I don't need a lecture on the Bankruptcy Code or
24 how Chapter 11 works.

25 BLAKE MILLER: I'm trying to explain myself and

1 I'm doing a poor job. I'm sorry. I believe --

2 THE COURT: The way that you are characterizing
3 the confirmation order, you're putting a gloss and an
4 interpretation on it that is pretty new. It's certainly
5 going to be news to Lehman, who's been operating under the
6 confirmation order for quite a few years. So you can keep
7 going, but I really don't want a lecture on bankruptcy 101.
8 Okay? Go ahead.

9 BLAKE MILLER: I'm trying to explain where I
10 believe it is property of the Debtor, not property of the
11 estate.

12 THE COURT: Okay, go ahead.

13 BLAKE MILLER: I believe that when a plan gets
14 confirmed, property of the estate can go various ways, and
15 the plan can provide for it. If the plan doesn't provide
16 for it, the property of the estate -- the estate ceases, and
17 it just vests in the Debtor (indiscernible).

18 THE COURT: So what are these guys doing all these
19 years? Who were they working for? What are they going to
20 do with this money that they collect?

21 BLAKE MILLER: They would --

22 THE COURT: Where does that go?

23 BLAKE MILLER: The plan should provide for the way
24 it goes. I believe it probably goes to administrative
25 expenses, and then creditors. The plan should provide. The

1 plan is like a contract; in fact, I think that's the term
2 they used (indiscernible).

3 THE COURT: The plan is a contract, right. But
4 I'm trying to understand why you think that the Lehman plan
5 administrator doesn't have the right to exercise exclusive
6 control over the claims and causes of action that he's
7 pursuing in order to continue to liquidate the estate and
8 pay the creditors. That's the part I don't understand.

9 BLAKE MILLER: I believe the plan vests those
10 claims in the plan administrator. I'm not disagreeing with
11 what Your Honor just said. I believe it does. The issue is
12 whether or not it is still vested with the protection of
13 being property of the estate under Section 362. Now if the
14 plan and the confirmation order grants some additional
15 protections that 362 does not grant, then that's a plan
16 issue. And then I would argue or submit, respectfully, Your
17 Honor, we're not bound by that. Under 1141, the express
18 terms of the confirmation order, but express terms of the
19 plan.

20 I believe 362(a)(3) only applies to property of
21 the estate. I don't believe the plan continued the estate.
22 It did continue the automatic stay. It did vest these
23 causes of action and the plan administrator to pursue and
24 collect on behalf of creditors.

25 THE COURT: Okay.

1 BLAKE MILLER: There is much said at the beginning
2 of counsel's statements, I don't believe that they are
3 relevant to the issue of the automatic stay. It's been
4 clear in the issue of forum shopping, I'm just -- on the
5 merit comment, I suppose. To that, Your Honor, would be
6 that whether or not it's forum shopping isn't a violation of
7 the automatic stay. It's a separate issue, separate
8 matters, and maybe it's related to the other matters before
9 the Court involving other parties, but not Security
10 National.

11 We do believe there's been a lot said here. I
12 know that the proposed order that was submitted to Your
13 Honor, it asks you to make certain findings based on the
14 motions. My concern --

15 THE COURT: You know, what -- I'm just trying to
16 distill down what you're saying. And one of your key points
17 is you weren't here during the plan process, you can't
18 possibly be bound. But that's an incorrect view of 1141.

19 BLAKE MILLER: May I respond? I wasn't sure.

20 THE COURT: Sure, you can respond.

21 BLAKE MILLER: 1141(b) - I'm sorry.

22 THE COURT: You know, here's the thing. There's a
23 lot of discussion about, you know, Bankruptcy Court's post-
24 confirmation jurisdiction and lessons. There's a lot of
25 clarity about it -- that's point number one.

1 Point number two is, I will agree with you that we
2 ought to pay attention to the scope of plan injunctions.
3 Okay? Because you cannot -- a Bankruptcy Court cannot enter
4 a plan injunction that, for example, could be read to limit
5 ordinary commercial activity. But a plan injunction and a
6 plan of reorganization have to have the ability to safeguard
7 to the Debtor that's emerging from bankruptcy the ability to
8 collect, pursue causes of action and control that property
9 for the benefit of the creditors of the estate. It has to;
10 otherwise, it's a free-for-all.

11 BLAKE MILLER: The causes of action are vested in
12 the plan administrator, and the plan administrator is
13 charged with that responsibility. We are not contesting
14 that.

15 THE COURT: You're interfering with that property.

16 BLAKE MILLER: Post-confirmation, I mean, those
17 claims can be brought in State Court, it can be brought
18 other places. It doesn't interfere with it, nor does it --

19 THE COURT: Of course it interferes with it. It's
20 not your call. It's the plan administrator's call. The
21 property belongs to him. The only reason that you are here
22 complaining is because you want to bring your dec action
23 anywhere but here, because you know already that here, this
24 Court has a view of the statute of limitations that is
25 different from your view. That's the only reason. Let's

1 just be very blunt -- that is the only reason.

2 So, therefore, nothing could be more clearly
3 interfering with the plan administrator's plan to bring
4 these causes of action here and, by the way, in one place.
5 He's a fiduciary who doesn't have the ability or the
6 resources to run around the country after 3000
7 counterparties and thousands and thousands of loans and
8 bring one-off suits. That's the whole point. That's the
9 point of the ADR. That's the point of these provisions that
10 got included in the plan and in the confirmation order and
11 that, frankly, people have been obeying and relying on for
12 years.

13 BLAKE MILLER: In response, Your Honor, the action
14 in Delaware was filed for a number of reasons. I can get
15 into them or Mr. Price is more familiar with them. But
16 whether or not these are vested with the Debtor with the
17 right to pursue them, I think is a separate issue. And
18 whether or not there is an exclusive determination by the
19 plan administrator on how they're to be brought and how
20 they're to be resolved and the parties against whom they're
21 sought have no say.

22 I think 1141(a) of the Code identifies -- let me
23 grab the section, Your Honor -- the provisions of the
24 confirmed plan by the Debtor in any issues and securities
25 under the plan, in an entity to acquiring property under the

1 plan, and any creditor, security holder, or general partner
2 of the Debtor.

3 We have cited two cases saying that non-Debtors or
4 non-parties can be bound. I think if you don't participate
5 in the case and you fall within one of these classes, you're
6 going to be bound. If we're a creditor and there's a
7 channeling injunction that the plan provides, I think we're
8 bound. If we fall within these classes, I think we're
9 bound.

10 The confirmation order uses the same description,
11 Your Honor, and so does the plan. We are not -- and it's
12 undisputed -- we are not any of these classes. If we have a
13 claim against the Debtor and the plan provided for
14 channeling that we had to pursue, we're bound by that
15 whether or not we chose to come in New York and argue about
16 it. That's part of the reorganization process. But this is
17 a plan injunction, though, the simple fact is we don't
18 follow in its classifications of people or entities that
19 either the plan or the confirmation order can bind.

20 Counsel for Lehman argued this is a contract. I
21 wouldn't disagree. But a contract only binds the parties to
22 the contract. It doesn't bind non-parties. If it's a
23 consent decree -- not a consent decree, but a consent order
24 of the confirmation plan, it binds those that are party to
25 the case or could have been parties.

1 THE COURT: So what about 13 -- so about Section
2 13.7 of the plan?

3 BLAKE MILLER: 13.7 vested the property and said,
4 plan administrator, you have all these rights. Go forth,
5 they're yours. And free of the Bankruptcy Code, free of the
6 bankruptcy case, as if no bankruptcy case did, in fact,
7 (indiscernible), but you're bound by the plan.

8 THE COURT: Are you talking about 13.1 or 13.7?

9 BLAKE MILLER: I'm sorry.

10 THE COURT: 13.1 is the revesting.

11 BLAKE MILLER: Okay, 13.7, the continuation says.

12 THE COURT: Yeah.

13 BLAKE MILLER: What is say is any stay, whether or
14 on the 105 or 362, that, in effect, on consummation date
15 shall continue to fall into the case. It doesn't expand --
16 if a 105 stay had been entered, it didn't expand it or
17 change it or effect it any way, just continued it. If there
18 is a stay on 362, which I'll (indiscernible), it continues
19 that until close of the case, but it didn't change the way
20 it operates.

21 I would submit that as to property of the estate,
22 it ceases under Federal law, 362(c), when it becomes
23 property of the estate. If we're going to say something
24 different from that, then there's a plan injunction and
25 wouldn't bind us because we're not within the

1 classification. 362(c), I think is -- so I don't misspeak,
2 let me check it -- except as provided in (d)(e) and (f) and
3 (h), the stay of an act that is property of the estate under
4 subsection (a) -- it's in (a)(3) -- or this section
5 continues until such property is no longer property of the
6 estate. That's what 362 provides, and 362(a)(1) or (a)(3)
7 bars actions that affect property of the estate. Now
8 there's other provisions that, of course, they obviously
9 applies to, but this would continue.

10 If Lehman would have wanted the plan to say the
11 estate continues, they could have done. Those plans often
12 are done, where the stay is continued in a plan trust or
13 some similar type of device. This was given to a plan
14 administrator to serve the plan free, as if no bankruptcy
15 case was in existence. So I ask my point simply, Your
16 Honor, it is, I don't believe that section, as I read it,
17 changed 362. If it did, it didn't minus.

18 Last, unless Your Honor has some questions, I do
19 object to any order that would make findings here because I
20 don't think there's enough in the record here. I've heard a
21 lot about extensive documents, I've heard a lot of other
22 things. None of that, to my knowledge, is in direct with
23 this case makes it because I've called him the bankruptcy
24 side and don't know any of the other.

25 THE COURT: I'm sorry, what --

1 BLAKE MILLER: But I don't recall of any
2 documents, I'm assuming, assigning the rights of Lehman Bank
3 to holdings, agreements between the bank and holdings,
4 agreements between holdings and Fannie Mae or Freddie Mac.

5 THE COURT: But I'm not making any findings, but
6 we had to talk about the predicate facts in order to have
7 something to talk about.

8 BLAKE MILLER: The reason I raise it in a proposed
9 order had you make a finding. You're just finding set forth
10 in the motion. I don't know if that means -- and I should
11 tell you I don't know, there's nothing in the record.

12 THE COURT: This is not an evidentiary hearing.
13 There's no findings, there are not going to be any findings
14 one way or the other.

15 BLAKE MILLER: Well, are there either questions or
16 --

17 THE COURT: No, we're going to keep going for a
18 while.

19 BLAKE MILLER: Thank you.

20 THE COURT: Thank you.

21 MR. HOFFMAN: Good afternoon, George Hoffman for
22 iFreedom, Your Honor. I'll take the Court's invitation with
23 respect to the 362(a)(1) issue. I won't waste any of your
24 time with that. And normally, I'd rest the vesting of
25 property of the estate and the Debtor, my point is

1 consistent with Security National, but I think it works for
2 that.

3 What I would like to talk about is whether these
4 claims are property of the estate or not. And the position
5 that we took, based on various statements that Lehman has
6 made in pleadings that are highlighted in our papers, is we
7 laid out the chart that Your Honor referred to earlier. And
8 based on Lehman's statement, it appears these claims clearly
9 were not possessed by Lehman at the time of plan
10 confirmation.

11 THE COURT: See, that's where you're wrong. They
12 were possessed. You're conflating whether they were ripe,
13 whether they were mature, whether they were contingent or
14 not. They were possessed, but they could not be brought
15 until Fannie and Freddie settlements were approved. And
16 then, consistent with long-standing New York law, once the
17 payment is made to the third party, the third-party
18 indemnification right arises and then you can bring it.

19 So they had the claims, albeit in an unmaturred,
20 unripe, contingent form. And I think that that is, you
21 know, fundamentally where we're not going to see eye to eye.
22 And it's also inconsistent with the position, although I'm
23 not making any findings, gone through on all these cases
24 that the claims -- these are not indemnity claims related to
25 a breach of a repurchase obligation. In the seller's guide

1 in 710 and 711, the word indemnification is used in
2 different places and in different ways. And all due respect
3 to all the judges who have looked at this, you know, I've
4 given my view.

5 MR. HOFFMAN: I'm not here to argue about that,
6 Your Honor.

7 THE COURT: I understand that. What it has to do
8 with is then the nature of the claim do with accrual of the
9 claim.

10 MR. HOFFMAN: So I'm not going to address my view
11 of the world or Lehman's view of the world. I think it's
12 your view of the world that kind of counts in this
13 Courtroom.

14 THE COURT: One would hope so; otherwise --

15 MR. HOFFMAN: I certainly hope so.

16 THE COURT: -- we have chaos.

17 MR. HOFFMAN: And your view of the world was made
18 quite clear in Hometrust. I'm not here to argue contrary to
19 Hometrust. I'm here to argue, I think, consistent with
20 Hometrust.

21 THE COURT: Okay.

22 MR. HOFFMAN: And the Court was quite specific, a
23 cause of action for indemnification, which, again, we don't
24 agree with this necessarily, but this is the law in this
25 Court. A cause of action for indemnification occurs when a

1 party possesses a legal right to demand payment. Here, LBHI
2 possessed no such right until it paid Fannie Mae. Prior to
3 that time, no right referring to indemnification -- at least
4 the way I read it -- belonged only to Fannie Mae.

5 THE COURT: Right, but that's a maturity point.
6 That's a maturity point. That's not a point about whether
7 or not the causes of action existed in the sense of
8 property. That's a maturity point. They couldn't have
9 brought it yet.

10 MR. HOFFMAN: Let me phrase it this way, Your
11 Honor. Why is it that my client --

12 THE COURT: Let me give you another example, okay?

13 MR. HOFFMAN: Sure.

14 THE COURT: Lehman, as you know, has hundreds of
15 thousands of derivative contracts and swap transactions.
16 It's still figuring it all out because of the overwhelming
17 number of them. That doesn't mean that on the confirmation
18 date, it didn't have that cause of action, because it hasn't
19 gotten through the stack of tens of thousands of calculation
20 statements and valuation statements, and finally had been
21 able to figure out why a particular counterparty has
22 shortchanged it. That was always its property. It just
23 didn't figure it out until it finally brought the claim or
24 the adversary proceeding or whatever it is.

25 So the reason that this is so vexing to the types

1 of institutions that you represent is because it's so remote
2 in time from the inception of the transaction. I totally
3 get that. But, and we're a little bit off the point here,
4 but it's interesting. I mean, that's something that can be
5 addressed in future documentation. But I have to deal with
6 the documents as they exist at the time that everybody
7 transacted. And even though you were are now a moat in the
8 chain, it's been on down the line and the reps were carried
9 on and, you know, here we are with Lehman having paid an
10 enormous amount of money to Fannie and Freddie, and then
11 only then having the right to assert the third-party
12 indemnification claim.

13 And the breach -- the breach that everyone talks
14 about -- is not the breach of the purchase agreement. It's
15 not the breach of the rep at the time that the loan was
16 booked. It's a breach that occurs much later. So, you
17 know, I know you folks disagree, but that's -- for the
18 purposes of this -- that's the view of the world that I'm
19 going to take to describe the property of the estate issue.

20 MR. HOFFMAN: I understand completely. So here's
21 the difference, Your Honor. Why do you suppose it is that
22 my client has been sued by Lehman Brothers Holdings Inc.,
23 rather than Lehman Brothers Bank, the party that it has a
24 contract with?

25 THE COURT: Because Lehman Brothers Holdings Inc.

1 has the claim now, it has the indemnification claim. There
2 is no party -- that counterparty farther down the chain
3 doesn't hold anything anymore.

4 MR. HOFFMAN: So that would be because -- and let
5 me read what Lehman said about this. This is a quote from a
6 motion in the other matter that the Court will hear, or may
7 here. This is their response to the motion to dismiss or
8 transfer. This says, LBB then assigned its rights and
9 remedies under the agreements, including the indemnification
10 rights, to LBHI.

11 THE COURT: Yes, but this is where the imprecision
12 hangs everybody up. Yes, that's absolutely right, but this
13 indemnification -- the indemnification that generically is
14 talked about is included on both 710 and 711. It's used in
15 the agreement interchangeably with asking for money damages.
16 It's not the indemnification that is being sought now.
17 We're way far afield.

18 MR. HOFFMAN: Well, what I'm saying is their point
19 is LBB transferred all of its rights, including
20 indemnification rights, to LBHI. That's why LBB is not a
21 plaintiff in this situation.

22 THE COURT: All right, LBB is out of the picture.

23 MR. HOFFMAN: Because they transferred all their
24 rights to LBHI. In turn, LBHI transferred all of its rights
25 to Fannie and Freddie, and that's where those rights --

1 THE COURT: That's not true.

2 MR. HOFFMAN: How do we know that? That's what
3 they say. I'm not making this up, Your Honor. We have
4 their statements that that is what they said.

5 THE COURT: But we are talking -- we're talking
6 about different indemnification claims. Fannie and Freddie
7 had the right, at that point, had the right to assert
8 repurchase claims. Lehman doesn't have that right.

9 MR. HOFFMAN: We're talking about multiple
10 Lehmans, which confuses me.

11 THE COURT: Okay. Why don't you make your
12 argument, I'm going to stop talking.

13 MR. HOFFMAN: Sure. So the claims, Your Honor.
14 The claims, if they exist -- of course, we dispute that
15 there are any claims -- LBB entered into a contract with my
16 client. It wasn't LBHI; it was LBB. According to them --
17 not me -- according to them, LBB transferred all of its
18 rights, including indemnification rights, to LBHI.

19 Now, what happened after that point in the chain.
20 LBHI transferred its rights, presumably including
21 indemnification rights, just like LBB had done before to
22 Fannie Mae and Freddie Mac. That's where those rights sat,
23 those indemnification rights, contingent on the
24 indemnification rights belonging to Fannie Mae and Freddie
25 Mac at the time the plan was confirmed in 2012.

1 THE COURT: I disagree.

2 MR. HOFFMAN: Okay. What evidence do we have on
3 which?

4 THE COURT: It's not an evidence point. It's an
5 accrual of a cause of action point. It's a matter of law.
6 An indemnification claim, a third-party indemnification
7 claim, does not arise until a payment is made to a third
8 party. The indemnification claim arose when Lehman paid
9 Fannie and Freddie.

10 MR. HOFFMAN: What if all those rights had already
11 been transferred, Your Honor, which they had in this case.
12 Again, this is not -- what we're arguing about, it's
13 interesting, is not the actual documents or the evidence.
14 What we're arguing about, or we're discussing the colloquy,
15 about various statements Lehman has made in its pleadings
16 that are not entirely consistent, Your Honor. I think --

17 THE COURT: What does this have to do with whether
18 or not you're entitled to bring an action for a declaratory
19 judgment somewhere else?

20 MR. HOFFMAN: That's an excellent question.

21 THE COURT: Thank you.

22 MR. HOFFMAN: So the question is whether these
23 claims were property of the estate, okay? Our point is the
24 claims were not property of the estate because Lehman did
25 not have them at the time of the plan confirmation. It had

1 sold those claims to Fannie Mae and Freddie Mac. They
2 belonged to Fannie Mae and Freddie Mac as of that time.
3 It's only after the settlements with Fannie and Freddie are
4 approved where those rights are assigned back.

5 THE COURT: Do you understand that at the time of
6 plan confirmation that Fannie and Freddie had asserted huge
7 claims against Lehman?

8 MR. HOFFMAN: I've read that, yes.

9 THE COURT: Right, right. So it's the very nature
10 of, at that moment in time, Lehman knew -- if Fannie and
11 Freddie called up and said, I've got great news, we're not
12 filing any claims in your case. Okay? There would have
13 been joy and jubilation at team Lehman. They didn't do
14 that. They filed huge claims. So, therefore, from that
15 moment on, there was always a contingent and unmatured
16 indemnification claim that Lehman eventually would be able
17 to assert. That's when it started, the minute that Fannie
18 and Freddie filed the claim in this case.

19 MR. HOFFMAN: Well, what we know from Fannie and
20 Freddie filing huge claims in this case is they assert that
21 Lehman owes them a lot of money. What we don't know is if
22 Lehman had a correspondent right against my client based
23 upon that. And the only way I think we could determine
24 that, Your Honor, is if we saw the underlying paper by which
25 Lehman Brothers Holdings Inc. purported to acquire these

1 plans from Lehman Brothers Bank and then the paper by which
2 it transferred those claims to Fannie Mae and Freddie Mac.
3 Otherwise, it's a difficult question to answer, Your Honor,
4 without seeing that paper and knowing where the claims sat.

5 THE COURT: So is what you're saying now is that I
6 need to have an evidentiary hearing in order to resolve
7 Lehman's motion to stay?

8 MR. HOFFMAN: I think you have to determine
9 whether or not these claims are property of the estate. I
10 think that the Court can deny the motion as a matter of law,
11 but if the Court --

12 THE COURT: Deny it?

13 MR. HOFFMAN: Yes.

14 THE COURT: Why couldn't I grant it as a matter of
15 law?

16 MR. HOFFMAN: The reason you can't grant it as a
17 matter of law is because you need to determine, in order to
18 grant the motion, that these claims are property of the
19 estate.

20 THE COURT: So remind me again why, for \$1
21 million, you want to go through all this?

22 MR. HOFFMAN: A million dollars is a lot of money,
23 Your Honor.

24 THE COURT: It's a lot of litigation.

25 MR. HOFFMAN: I agree. My client doesn't seek out

1 litigation, Your Honor. We'd be happy to not litigate.

2 THE COURT: It starts litigation.

3 MR. HOFFMAN: We did start litigation, Your Honor,
4 there's no doubt about it. So, again, your question that
5 brought us here. Why does it matter? It matters -- and
6 this is not contested by Lehman. If the claims were
7 acquired by Lehman after the time of confirmation, they are
8 not property of the estate. If they are not property of the
9 estate --

10 THE COURT: You're parsing the words incorrectly.
11 The claim accrued, the cause of action accrued, it accrued
12 when the Fannie and Freddie payments were made. They
13 existed as property of the estate all during the case, as
14 soon as Fannie and Freddie made those claims, if not before.
15 It doesn't require looking at the underlying documents.

16 MR. HOFFMAN: You need to know how it is that
17 Lehman Brothers Holdings Inc. possesses rights against my
18 client.

19 THE COURT: Lehman Brothers Holdings Inc.
20 possesses rights against your client because Fannie and
21 Freddie were the upstream acquirers of loans originated by
22 your client.

23 MR. HOFFMAN: So would --

24 THE COURT: And Lehman has paid money to Fannie
25 and Freddie to settle defective claims -- the claims arising

1 from defective loans.

2 MR. HOFFMAN: We know that. What we do not know
3 is why Lehman Brothers Holdings Inc. held claims against my
4 client based on those facts. I don't disagree with anything
5 the Court has said. Why does it hold claims, as opposed to
6 Lehman Brothers Bank or some other person, Your Honor? We
7 don't know, other than we have Lehman's statements in
8 pleadings. Which those statements suggest, if not
9 constitute admissions, that at the time of plan
10 confirmation, the claims existed in Fannie and Freddie only.
11 And that's what the Court --

12 THE COURT: We're talking past each other. I
13 mean, there's no dispute, there's not dispute as to the
14 transfer of the claims on down the line or up line.

15 MR. HOFFMAN: Yes, it is, Your Honor. I dispute
16 that.

17 THE COURT: What do you mean?

18 MR. HOFFMAN: I have no evidence. I have seen no
19 paper -- isn't that we need to prove whether a fact is true
20 or not?

21 THE COURT: So your position is that Lehman, for
22 no good reason, paid Fannie and Freddie millions and
23 millions of dollars.

24 MR. HOFFMAN: Your Honor, I'm not here to second
25 guess Lehman.

1 THE COURT: But your theory is -- you're
2 suggesting to me that this entire process, including the
3 approval of a 9019 settlement, is built on sand; is that
4 Lehman paid all of this money, when it didn't have to,
5 because somewhere there wasn't a valid transfer. And I will
6 tell you that the issue of the transfer actually has been
7 ruled upon in the State Court in another context. You're
8 not a party to it, so you can't be bound by it, but this
9 notion that there's some sort of a break in the chain of
10 ownership is pretty frivolous.

11 MR. HOFFMAN: I didn't say there was a break in
12 the chain of ownership. I think we've specifically laid out
13 as best as we can tell what the chain of ownership is, and
14 it's not inconsistent with anything the Court's saying.

15 THE COURT: Okay. So what you're trying to do is
16 to get me to say something that you will then characterize
17 as a finding of fact.

18 MR. HOFFMAN: No, Your Honor.

19 THE COURT: And I'm not going to do that because
20 it's a matter of law that, as I've held in Hometrust, that
21 the indemnification claim accrued when Fannie and Freddie
22 were paid. You're trying to create a question of fact as to
23 whether or not LBHI had indemnification rights.

24 MR. HOFFMAN: Your Honor, I think it's their
25 burden to prove it's property of the estate. It's their

1 motion; they're the ones seeking relief from the Court. We
2 didn't bring this motion, and there's no evidence upon which
3 the Court could find these claims the property of the
4 estate.

5 I can tell the Court's not convinced with my
6 evidence, so I'll leave the podium, if that's all right.

7 THE COURT: I think you should. Do you have
8 anything else?

9 MR. HOFFMAN: The only other thing I would say,
10 Your Honor, is litigating in a claim in a forum that's
11 disfavored by --

12 THE COURT: Do you take the position that you're
13 not bound by the confirmation order?

14 MR. HOFFMAN: No.

15 THE COURT: You're (indiscernible).

16 MR. HOFFMAN: On some completely unrelated loans
17 that have nothing to do with this, we file a claim or a
18 creditor, we're bound.

19 THE COURT: I appreciate that. Someone wants to
20 hand you a note. You can hand it to him now.

21 MR. HOFFMAN: So, Your Honor, the last point I
22 make is that litigating a claim in a forum that Lehman
23 doesn't appreciate is not exercising control of property of
24 the estate.

25 THE COURT: It's interfering with it.

1 MR. HOFFMAN: In what way? They want to litigate
2 it clearly; they've sued my client. We want to prove they
3 have no claim. It's a question of where that litigation
4 will take place.

5 THE COURT: Right, and your view of where that
6 litigation should take place is anywhere but here because of
7 the statute of limitations point.

8 MR. HOFFMAN: Well, I think there's a host of
9 reasons, Your Honor. I mean, I'm not going to hide about
10 the statute of limitations. That's clearly an issue, but
11 it's not the only issue. My client's headquartered in Salt
12 Lake City; it's employees, the vast majority of them, are in
13 Salt Lake City; the witnesses, the documents are in Salt
14 Lake City. I'll address that later on, but that's not the
15 only reason, the statute of limitations question. There are
16 a variety of reasons.

17 THE COURT: Could one of them be that you think a
18 Utah judge will look more kindly on your clients that I
19 will? Because that's completely, if you want to talk about
20 something for which there's no evidence, there is no
21 evidence.

22 MR. HOFFMAN: I don't think I argued that, Your
23 Honor.

24 THE COURT: Lehman doesn't win all the time here.

25 MR. HOFFMAN: Your Honor, I'm expecting a fair

1 shake in this Court.

2 THE COURT: I give everyone a fair shake.

3 MR. HOFFMAN: So I'm not going to argue this Court
4 isn't fair. That's not my argument. My argument is this
5 litigation will occur somewhere; we disagree where it's
6 going to be, obviously; and litigating a claim in a forum
7 that Lehman today doesn't care for is not exercising control
8 of property of the estate. And I think it bears emphasis
9 here, Lehman filed these cases all over the country.

10 THE COURT: Lehman filed, that's the key
11 difference, Lehman filed -- their call -- Lehman filed.

12 MR. HOFFMAN: Right. Was defending a cause of
13 action, is that interfering with property of the estate?

14 THE COURT: You have dictated how to bring -- have
15 litigation, where the litigation will unfold. That's
16 interfering with Lehman's enjoyment of all the aspects of
17 its property, which is this cause of action.

18 MR. HOFFMAN: By the same token, any defense of
19 the cause of action I think would amount to interference,
20 Your Honor. It's just a place that they don't care for.

21 THE COURT: But that's ResCap, that's clearly
22 silly. I mean, they bring a cause of action, the rule is
23 not you can't defend; of course, you can defend. But they
24 assert that the full enjoyment of their property right
25 includes the right to determine the forum in which the

1 litigation is brought, particularly against a backdrop of
2 litigation being brought in a way that is unfavorable to
3 them -- and remember who they are. There is no Lehman; it's
4 just creditors, it's creditors. There's no, you know,
5 Lehman; it's just creditors.

6 MR. HOFFMAN: I understand the Court's point.
7 It's a dispute between two parties. It's a state law
8 dispute. It can be heard any number of different places,
9 and I would fully expect Lehman to file a case in the place
10 that's most advantageous to it. I think that's their
11 attorney's duty. And on the flip side, I think other
12 parties should do what's in their client's best interest to
13 defend against those claims, Your Honor. And I agree, that
14 ResCap, and the stay is usable as a shield to prevent
15 dismemberment. It's not meant as a tool, as a litigation
16 tactic, to channel litigation to a forum of the Debtor's
17 choice. That's not the purpose of it.

18 THE COURT: Okay, thank you. You want to take
19 your --

20 MS. ADLER: Yeah, just give us one minute, please.

21 THE COURT: Sure.

22 MR. HOFFMAN: Just a couple of very brief points.

23 THE COURT: Sure.

24 MR. HOFFMAN: What I meant to make that I'd
25 forgotten in the course. So the seller's guide is obviously

1 highly material to a problem many of the claims the Court
2 will have before it. To four of the six claims that are at
3 issue in our case, it has no application, and that's because
4 the broker agreement that we have that governs four of the
5 six claims is not appropriate to the seller's guide.

6 THE COURT: Okay.

7 MR. HOFFMAN: The next point is the
8 indemnification packets that Lehman provided to us indicated
9 it acquired the claims that's asserting in 2013.

10 THE COURT: I don't know what -- I hear you. I
11 won't disagree with you. I don't know what exactly that
12 refers to.

13 MS. ADLER: It refers, Your Honor, to an
14 assignment that is referenced in the ADR, Your Honor,
15 package that Lehman sent to iFreedom that says that they
16 acquired these rights to go after us through an assignment
17 they obtained from Lehman Brothers in 2013. And that's --
18 we can get you that document.

19 THE COURT: Okay. I don't know what to say to
20 that. I hear you, but I don't know what that is.

21 MR. MAHER: Your Honor, they're starting to
22 discuss what was talked about in ADR, which we think is
23 improper. I won't respond to the legal arguments, which
24 obviously you have well in hand. The reality is that --

25 THE COURT: Well, there's a couple of things that

1 I would like you to respond to. The first, I think the crux
2 of the argument is that your interpretation of the
3 confirmation order inappropriately or improperly extends the
4 automatic stay? Is that a fair characterization?

5 MR. MILLER: What I would say is it extends it; it
6 shouldn't change to which it applies and what it doesn't
7 apply.

8 THE COURT: Okay, thank you. So that's point
9 number one. And then the second point that was made was
10 that under 1141, they're not bound because they don't fall
11 into the category.

12 MR. DeFILIPPO: Can I address that, Your Honor?

13 THE COURT: I will give you relief from the local
14 rule, the no whack-a-mole rule, which is that multiple
15 people can't pop up. Go ahead, Mr. DeFilippo.

16 MR. DeFILIPPO: The discharge doesn't take affect
17 under the plan and the order until all distributions are
18 made. So, as you noted earlier, it's essential that the
19 stay continuing to affect with respect to all the property
20 that is vested in the Debtors under the plan; otherwise,
21 dismemberment would be a potential occurrence.

22 So we don't think we're viewing it excessively
23 broadly; we think we're viewing it in a practical way that
24 is necessary to give effect to all of the provisions of the
25 confirmation order and the plan.

1 THE COURT: So the distinction between the Debtor
2 and the estate is not -- it doesn't make any difference?

3 MR. DeFILIPPO: It doesn't make a functional
4 difference for purposes of what this confirmation order and
5 plan were designed to do, which was to protect assets that
6 may have been technically revesting from the estate to the
7 Debtors, but still needed the protections of the stay in
8 order not to be subject to --

9 THE COURT: But counsel's going to say that if I
10 give it that effect, then I'm rewriting 362.

11 MR. DeFILIPPO: Well Your Honor is the only Court
12 that has the power to interpret the confirmation order. And
13 we think a proper interpretation of that order,
14 notwithstanding 362, would be to treat the injunctions that
15 are contained in it as effective to the claims in this case.

16 Now I want to make a point about 362(a)(3) that
17 was overlooked. 362(a)(3) does not only apply to property
18 of the estate; it applies to the obtaining of property from
19 the estate. In addition to that, it doesn't have to be
20 property of the estate in order to be protected by
21 362(a)(3), which I think is an important distinction. There
22 is really no functional difference between the estate and
23 LBHI as plan administrator. They are both in existence to
24 serve the beneficial purposes of their creditors.

25 LBHI continues in that while it is the

1 representative of the Debtor under the plan, Your Honor,
2 6.1(b) of the plan, the creation of the plan administrator
3 effectively continues the Debtor; 6.1(b) says that the plan
4 administrator is the substitute for the Debtor in all
5 respects. So I don't think it's much of a stretch at all to
6 find that the estate functionally continues in effect, even
7 if the property of the estate reverts in a different entity
8 that is the successor to the Debtor.

9 THE COURT: Thank you. Anything more? Sure.

10 MR. DeFILIPPO: In regards to the order, the plan
11 administrator is representative of the Debtors, the
12 management of the Debtor, if you want to look at it that
13 way. There's no difference to the Debtor directly or
14 someone before the Debtor. It's the difference between the
15 Debtor and the estate that's important; not between the
16 Debtor and Debtor's management or plan administrator for the
17 Debtor.

18 To the second point is 362(a)(3) is governed, only
19 applies to estate property. Any act to obtain possession of
20 property of the estate or property from the estate or to
21 exercise control over the property of the estate, the estate
22 is the central feature of 362(a)(3) and it can properly give
23 the estate (indiscernible).

24 Now the other provisions? No, they're free of
25 that restriction. But (a)(3) alone is estate property based,

1 which brings me to my last point -- hopefully, last. We
2 have to decide what stay we're talking about here.

3 THE COURT: Can I just stop and ask a question?
4 Suppose that on the day of confirmation, the Debtor has a
5 contract and there's a breach -- ordinary, garden variety.

6 MR. HOFFMAN: That occurred on confirmation date?

7 THE COURT: That has already occurred on the
8 confirmation date, okay, a breach. And then the plan
9 confirms. And now that they have the bankruptcy behind
10 them, they're going to sue the counterparty for the breach.
11 And the plan provides and the confirmation order provides
12 what this one does. Okay? In your view of the world, the
13 Debtor doesn't have the right to control that litigation,
14 that that's not property of the Debtor, the estate?

15 MR. HOFFMAN: In my view, the plan administrator
16 is vested with the right on behalf of the Debtor to bring
17 those causes of action. It's the adverse party.

18 THE COURT: It is, okay.

19 MR. HOFFMAN: But it doesn't control everything
20 relating to that -- state law, other laws now apply. If you
21 look at 13.7, as if the Bankruptcy Code or the Rules -- or
22 the Bankruptcy Code or provisions are not in effect.

23 The other (indiscernible) if I were to use your
24 example, if we had a cause of action that existed on the
25 confirmation date, so the stay applied to it on the

1 confirmation date wen to the Debtor. The Debtor decided I'm
2 not going to litigate it, I'm going to sell it. I'm going
3 to sell it to a hedge fund it Florida. Based on this
4 interpretation, the estate follows it all the way down to
5 Florida. Now you got a Florida -- that nothing to do with
6 this case because that stay applied.

7 My point is, once it leaves the estate --

8 THE COURT: Selling it to a third party is
9 entirely different. That's not an apt analogy. You're
10 drawing some distinction here that, frankly, was never -- it
11 undermines the ability of the plan administrator to
12 administer the estate.

13 MR. HOFFMAN: The plan administrator is charged
14 with the sole responsibility of administering, but that
15 doesn't mean it controls non-parties, controls Security
16 National, with respect to where this litigation is to be
17 done. That's other law, that's first right (indiscernible)
18 conveniences, a whole bunch of other law that governs that.
19 It didn't exclude that. It just said that they're
20 representative of a trustee of a trust. They're the
21 representative discharged with liquidity this.

22 The distinction I am making is between the estate
23 and the Debtor. I think that, in my view, an important and
24 crucial -- crucial -- distinction. Once Lehman's leaves the
25 estate, it loses the protection of (a)(3), and that's the

1 way 362 works, which brings me back to what's the Debtor
2 operating under. 362, as Congress ruled it, stops the
3 protection of the estate when it gets revested in the
4 Debtor, which this plan did. The plan administrator is
5 simply the representative of the Debtor.

6 If this is a plan injunction, it goes beyond that.

7 THE COURT: I understand the plan injunction
8 point.

9 MR. HOFFMAN: All right. If there are no
10 questions, I'm done.

11 THE COURT: Okay, thank you.

12 MR. DeFILIPPO: Your Honor, I never answered your
13 question as to why the confirmation order binds non-
14 creditors. It's because it's an order of this Court that
15 once somebody -- somebody can violate an injunction without
16 being a creditor. If there's an injunction issued and
17 people are ordered not to do things and they do them anyway,
18 which is what happened, then they don't have to be a
19 creditor to violate a Court order. They simply violate it.
20 They are -- now you're asking it to be enforced them. So
21 for purposes of enforcement, they are a party and interest.
22 But it can be effective as against them once we bring them
23 here and ask you to enforce it against them.

24 MR. HOFFMAN: May I respond to that, Your Honor.

25 THE COURT: Yes, you can, but hold on a minute.

1 MR. DeFILIPPO: It's no different than any
2 affirmative injunction from a Federal Court that can bind
3 non-parties. We could provide law if there is any doubt
4 about this, but I didn't think there was. But Federal
5 Courts have the power to enjoin non-parties to the actions
6 before them and to have those injunctions enforced by
7 subsequent proceedings.

8 THE COURT: Go ahead.

9 MR. HOFFMAN: I don't think I could disagree more.
10 I do not believe an injunction can bind non-parties. An
11 injunction of Rule 65 of the Federal Rules would bind
12 parties and those in privity or control content, but they
13 need due process, they need to participate. The cases that
14 I'm aware of and two cited by Lehman Brothers were creditor
15 cases, they would come within the universe of people that
16 would be bound by that plan. And even then, the Court
17 indicated you don't have the right to come in and argue this
18 -- there's due process, but you're within that
19 classification, so we're going to extend it to you.

20 If what the plan administrator wants is Rule 65
21 injunction, then we need to go through that process. It's a
22 separate issue, four standards that requires an adversary
23 proceeding, injunction, all that. I thought what we're
24 talking about is an existing injunction, whether it's 362 or
25 plan injunction, they think it applies to this.

1 THE COURT: That's what I thought as well. Okay,
2 what I'd like to do is take a short break and then come back
3 and talk to you a bit. All right? Let's see, if you could
4 come back at 3:45. Thank you.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski
Hyde

Digitally signed by Sonya Ledanski Hyde
DN: cn=Sonya Ledanski Hyde,
o=Veritext, ou,
email=digital@veritext.com, c=US
Date: 2016.05.09 16:03:36 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: May 9, 2016